

Memorandum 95-46**Civil Code § 1464: Covenants That Run With The Land (Comments on Tentative Recommendation)**

Attached to this memorandum is a copy of the Commission's tentative recommendation to repeal Civil Code Section 1464. That section codifies the common law First Rule in Spencer's Case, which states that a real property covenant concerning something not in existence does not run with the land unless the word "assigns" is used. The law on covenants running with the land has generally evolved beyond this rule to a less formalistic posture.

The tentative recommendation was circulated for comment over the summer. We have received two comments on the tentative recommendation. The proposal is applauded by Professor Susan French of UCLA Law School, who points out that repeal is consistent with the new Restatement of Property (Servitudes). Exhibit p. 1. The proposal is also supported by the State Bar Real Property Section, which agrees that the statute "is outdated and that its continued presence in the statutory scheme could cause interpretative problems because of later enacted statutes." Exhibit to Memorandum 95-45.

The staff recommends that the Commission approve this tentative recommendation as a final recommendation for printing and submission to the Legislature.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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June 29, 1995

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Tentative Recommendation for Repeal of Civil Code § 1464:

I applaud your recommendation to remove the first rule of Spencer's Case from the California Civil Code. It is consistent with the new Restatement of Property (Servitudes), which provides:

§ 2.2 Intent to Create a Servitude

A contract or conveyance creates a servitude if it is intended to do so, and if it is otherwise effective to create a servitude. The intent to create a servitude may be express or implied. No particular verbal formula is required. (Tentative Draft No. 1, Adopted May, 1989).

Yours very truly,

A handwritten signature in cursive script that reads "Susan F. French".

Susan F. French
Professor of Law
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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Repeal of Civil Code Section 1464: The First Rule in Spencer's Case

April 1995

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 31, 1995.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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REPEAL OF CIVIL CODE SECTION 1464:
THE FIRST RULE IN SPENCER'S CASE

Civil Code Section 1464 provides:

1464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

This provision was enacted as part of the 1872 Civil Code and has not been amended since. It is drawn from David Dudley Field's draft code¹ and codifies the common law First Rule in Spencer's Case.² That case deals with the question whether a covenant by a tenant "for him, his executors, and administrators" to build a brick wall on leased premises binds the tenant's assignee. The First Rule in Spencer's Case states that a covenant concerning something not in existence must expressly mention "assigns" in order to run with the land. (The Second, and more important Rule in Spencer's Case, is that a covenant must "touch and concern" the land in order to run.)

Section 1464 addresses the issue of the requisite expression of intent for a covenant to run with the land. The ancient concept that a specific word such as "assigns" must be mentioned has generally been discarded throughout the United States,³ as well as in England⁴ where the concept originated. The modern concept is that whether a covenant is intended to run with the land is determined from the entire instrument and that use of the word "assigns" is not necessary.⁵

The requirement of Section 1464 that assigns must be mentioned has been largely eclipsed by later enacted provisions of the Civil Code that provide a more liberal standard for determining intent. Sections 1469 and 1470, enacted in 1953, include a provision that a covenant by an owner of property to improve contiguous leased premises does not run with the land unless successive owners "are in the lease expressed to be bound thereby for the benefit of the demised real property." Likewise, Section 1468(b), as revised in 1968 and thereafter, includes a provision that a covenant for improvement of land made between a grantor and grantee of

1. Section 695.

2. 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583).

3. See, e.g., *Purvis v. Shuman*, 273 Ill. 286, 112 N.E. 679 (1916); Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 Tex. L. Rev. 428-29 (1949); C. Berger, *Land Use and Ownership* § 10.5 (3d ed. 1983); 5 R. Powell & P. Rohan, *Powell on Property* ¶ 673[2] (1994).

4. Bordwell, *English Property Reform and its American Aspects*, 37 Yale L.J. 1, 27 (1927).

5. See, e.g., French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 So. Cal. L. Rev. 1261, 1271 (1982); Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loy. L.A. L. Rev. 405, 557 (1989).

the land runs with the land if "successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee."

The later enacted statutes codify the modern trend of the law concerning formalities such as use of the word "assigns".⁶ The later enacted statutes are also broader in their application than the codification in Section 1464 of the particular circumstances of Spencer's Case. If a case were to arise in which either Section 1464 or one of the later enacted statutes could be applied, it is not clear which would be held to prevail.

The Law Revision Commission recommends that Section 1464 be repealed. It is an unnecessarily formalistic relic of a bygone era and is inconsistent with modern concepts of construction of instruments. It conflicts with more recently enacted statutes, and its existence creates the potential for litigation over which statute should be applied. Repeal of the provision would supplant a codification of 1583 English law with modern legislation and contemporary common law.

PROPOSED LEGISLATION

An act to repeal Section 1464 of the Civil Code, relating to covenants that run with the land.

The people of the State of California do enact as follows:

Civ. Code § 1464 (repealed). First Rule in Spencer's Case

SECTION 1. Section 1464 of the Civil Code is repealed.

~~1464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.~~

Comment. Section 1464 is repealed because it is inconsistent with modern principles of construction of instruments and is eclipsed by the broader provisions of more recently enacted statutes. See Sections 1468, 1469, and 1470, which do not require use of the word "assigns" in order that a covenant run with the land, but only that successive owners are "expressed to be bound" in the instrument. See also 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:2 (2d ed. 1990); 4 B. Witkin, *Summary of California Law, Real Property*, § 487 (9th ed. 1987). Section 1464 codified the First Rule in Spencer's Case, a common law principle that is now discredited in both the United States and Great Britain. See, e.g., Bordwell, *English Property Reform and its American Aspects*, 37 *Yale L.J.* 1, 27 (1927); C. Berger, *Land Use and Ownership* § 10.5 (3d ed. 1983); 5 R. Powell & P. Rohan, *Powell on Property* ¶ 673[2] (1994).

6. See 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:2 (2d ed. 1990); 4 B. Witkin, *Summary of California Law, Real Property*, § 487 (9th ed. 1987).